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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SENORX, INC.,

Plaintiff,

vs.

COUDERT BROTHERS, LLP; and DOES
1-500, inclusive,

Defendants.

CASE NO. C -01075 SC

**PLAINTIFF SENORX, INC.'S REPLY
MEMORANDUM IN OPPOSITION TO
REMOVAL AND MOTION TO
REMAND OR ABSTAIN**

Date: May 11, 2007

Time: 9:00 am

Trm: 10

Judge: **Honorable Samuel
Conti**

Complaint Filed: October 27, 2004

1 **I. INTRODUCTION**

2 Contrary to Defendants' assertions in their Opposition papers, at the very least,
3 Plaintiff SenoRx, Inc.'s claims against the nondebtor Individual Partner Defendants should
4 be remanded to the California Superior Court on the following grounds:

5 1. Plaintiffs' claim against the Individual Partner Defendants is not a "core"
6 proceeding;

7 2. Remand of this motion would not violate the automatic stay because the
8 Individual Partner Defendants are nondebtors and this action is not subject to the
9 automatic stay as to the Individual Partner Defendants;

10 3. Whether or not SenoRx consented to the jurisdiction of the United States
11 Bankruptcy Court for the Southern District of New York in the Coudert Brothers LLP
12 bankruptcy case by filing a proof of claim is irrelevant as to the propriety of remanding
13 Plaintiffs' claim against the Individual Partner Defendants, because they are not parties
14 to that action;

15 4. As set forth in Plaintiff's moving papers, remand based upon equitable
16 grounds and/or abstention is proper.

17 Plaintiff's claims against the Individual Partner Defendants should be remanded to
18 the California Superior Court in which they were originally and properly filed.

19 **II. LEGAL ARGUMENT**

20 **A. PLAINTIFF'S ACTION AGAINST THE INDIVIDUAL PARTNER DEFENDANTS**
21 **IS NOT A "CORE" PROCEEDING**

22 A bankruptcy court has original and exclusive jurisdiction over bankruptcy cases.
23 See 28 U.S.C. § 1334(a). The bankruptcy court's exclusive jurisdiction encompasses "all
24 matters connected with the bankruptcy estate." Gruntz v. County of Los Angeles (In re
25 Gruntz), 202 F.3d 1074, 1083 (9th Cir. 2000) (quoting Celotex Corp. v. Edwards, 514 U.S.
26 300, 308 (1995)). In Gruntz, the Ninth Circuit further explained that exclusive jurisdiction
27 exists over "core" proceedings. See Gruntz, 202 F.3d at 1081 ("[T]he separation of "core"
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1 and "non-core" proceedings . . . creates a distinction between those judicial acts deriving
2 from the plenary Article I bankruptcy power and those subject to general Article III federal
3 court jurisdiction."); see also 28 U.S.C. § 157. A "'core proceeding' is one 'that invokes a
4 substantive right provided by title 11 or . . . a proceeding that, by its nature, could arise
5 only in the context of a bankruptcy case.'" Gruntz, 202 F.3d at 1081 (quoting Wood v.
6 Wood (In re Wood), 825 F.2d 90, 97 (5th Cir. 1987)). Put another way, "core" proceedings
7 are those that "arise under the Bankruptcy Code or arise in a bankruptcy case." McCowan
8 v. Fraley (In re McCowan), 296 B.R. 1, 3 (9th Cir. BAP 2003).

9 Plaintiff does not dispute that adjudication of the **proof of claim** that it filed against
10 Debtor Coudert Brothers LLP is a "core proceeding," because a "proof of claim" only arises
11 in a bankruptcy proceeding. However, Plaintiff strenuously disputes that its action against
12 the Individual Partner Defendants for professional malpractice is a "core proceeding" under
13 the Bankruptcy Code. Plaintiff's malpractice claim against the Individual Partner
14 Defendants is most certainly not one that "could only arise in the context of a bankruptcy
15 proceeding."

16 In their Opposition papers, Defendants argue that by filing a proof of claim against
17 Defendant Coudert Brothers LLP in the Coudert Brothers LLP bankruptcy case thereby
18 consenting to the jurisdiction of said Court **as to Plaintiff's claim against Coudert**
19 **Brothers LLP only**, Plaintiff has also consented to the jurisdiction of said Court over
20 Plaintiff's claim against the Individual Partner Defendants. The Individual Partner
21 Defendants also argue that by filing this proof of claim, Plaintiff's claim against the
22 nondebtor Individual Partner Defendants has somehow been transformed into a "core"
23 bankruptcy proceeding. Nonsense.

24 Not one single case cited by Defendants holds that by filing a proof of claim in a
25 debtor's bankruptcy case, a plaintiff also consents to the jurisdiction of the bankruptcy
26 court to hear claims that a plaintiff may have against nondebtors. Nor do Defendants cite
27 to a single case in which the filing of a proof of claim in a debtor's bankruptcy case
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1 transforms a plaintiff's claims against a nondebtor into a "core" bankruptcy proceeding.

2 These arguments by Defendants in opposition to Plaintiff's motion for remand may
3 be summarily dismissed by this Court.

4 Without citation to any admissible evidence whatsoever, Defendants claim in their
5 Opposition papers that "most if not all of the Individual Partner Defendants have filed
6 proofs of claim with the bankruptcy court regarding their intention to seek indemnity from
7 Coudert Brothers LLP for this claim." Defendants' Opposition at pp. 10. Ignoring the clear
8 conflict of interest of the law firm of Wilson, Elser, Moskowitz, Edleman & Dicker
9 representing both Defendant Coudert Brothers LLP and the Individual Partner Defendants,
10 given that the Individual Partner Defendants have allegedly filed proofs of claim against
11 Coudert Brothers, such a statement is made completely without providing this Court with
12 any admissible supporting evidence. Thus, whether or not the Individual Partner
13 Defendants have or have not filed proofs of claim should be ignored by this Court in ruling
14 on Plaintiff's motion for remand.

15 Defendants spend a considerable amount of time and space in their Opposition
16 papers trying to convince this Court that it has jurisdiction of this matter under 28 U.S.C.
17 § 1452 which provides for the removal of claims related to bankruptcy cases. Even if this
18 Court determines that it has jurisdiction of Plaintiff's action against the nondebtor Individual
19 Defendants as an action "related to" the bankruptcy proceedings, "**Congress has**
20 **explicitly provided for courts to find that those matters are more properly**
21 **adjudicated in state court.**" Williams v. Shell Oil Co., 169 B.R. 684, 690 (S.D. Cal. 1994).
22 Section 1452(b) provides for such equitable remand:

23 "The court to which such claim or cause of action is removed may remand
24 such claim or cause of action on any equitable ground. An order entered
25 under this subsection remanding a claim or cause of action, or a decision to
26 not remand, is not reviewable by appeal or otherwise by the court of appeals
27 under section 158(d), 1291, or 1292 of this title or by the Supreme Court of
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1 the United States under section 1254 of this title.”

2 As set forth in Plaintiff’s moving papers, regardless of this Court’s jurisdiction over
3 Plaintiff’s claim against the Individual Partner Defendants on the basis that it is “related to”
4 Debtor Coudert Brothers LLP’s bankruptcy proceedings, this Court should remand
5 Plaintiff’s claim against the Individual Partner Defendants on equitable grounds. See, e.g.,
6 Williams, 169 B.R. at 692–93.

7 **B. THE AUTOMATIC STAY DOES NOT APPLY**
8 **TO PLAINTIFF’S CLAIM AGAINST THE INDIVIDUAL PARTNER DEFENDANTS**

9 Defendants claim that remand of this action should be denied, because of the
10 automatic stay provisions of 11 U.S.C. 362(a). The automatic stay, however, is not a
11 refuge for nondebtor parties to resist an action against property that is neither property of
12 the estate nor of the Debtor. Here, Plaintiff’s claim against the Individual Partner
13 Defendants is neither a claim against the property of Debtor Coudert Brothers LLP’s
14 estate, nor against Coudert Brothers LLP. Thus, the automatic stay provisions of Section
15 362(a) do not apply to Plaintiff’s claim against the Individual Partner Defendants.

16 The automatic stay serves several purposes. The stay gives a debtor a breathing
17 spell from creditors by stopping all collection efforts and all foreclosure actions. Maritime
18 Elec. Co., Inc. v. United Jersey Bank, 959 F.2d 1194, 1204 (3d Cir. 1991) (citation
19 omitted). In this
20 respect, the stay permits the debtor to attempt a repayment or reorganization plan; or it
21 simply relieves the debtor of the financial pressures that drove him into bankruptcy. Id. at
22 1204. The stay also protects creditors by preventing particular creditors from acting
23 unilaterally to obtain payment from a debtor to the detriment of other creditors. Id. (citation
24 omitted).

25 Although the scope of the automatic stay is broad, the clear language of Section
26 362(a) stays actions only against a “debtor.” Association Of St. Croix Condominium
27 Owners v. St.

Croix Hotel Corp., 682 F.2d 446, 448 (3d Cir. 1982). As a consequence, "[i]t is universally acknowledged that an automatic stay of proceedings accorded by § 362 may not be invoked by entities such as sureties, guarantors, co-obligors, or others with a similar legal or factual nexus to the . . . debtor." Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194, 1196-97 (6th Cir. 1983)); see also, United States v. Dos Cabezas Corp., 995 F.2d 1486, 1491-93 (9th Cir. 1993) (holding that stay does not preclude government from pursuing deficiency judgment against nondebtor cosignors of promissory note); Croyden Associates v. Alleco, Inc., 969 F.2d 675, 677 (8th Cir. 1992) (refusing to extend stay to claims against solvent codefendants), *cert. denied sub nom*, Harry and Jeanette Weinberg Foundation, Inc. v. Croyden Associates, 507 U.S. 908 (1993); Credit Alliance Corp. v. Williams, 851 F.2d 119, 121-22 (4th Cir. 1988) (enforcing a default judgment entered against a nondebtor guarantor of a note during the pendency of the corporate obligor's bankruptcy).

III. CONCLUSION

Plaintiff's claims for relief asserted against Defendant Coudert Brothers, LLP and the Individual Partner Defendants in this adversary proceeding are non-core proceedings. The automatic stay does not apply to nondebtor Individual Partner Defendants.

As set forth herein and in Plaintiff SenoRx, Inc.'s moving papers, In the interest of comity with the State court and respect for State law, on equitable grounds, and to preserve scarce judicial resources, Plaintiff's removed claim against the Individual Partner Defendants in this adversary proceeding should be remanded to the Superior Court of the State of California, County of San Francisco, pursuant to the Court's broad authority.

Dated: April 13, 2007.

LAW OFFICES OF MICHAEL J. PIUZE

By: _____

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Attorney for Plaintiff SenoRx, Inc.